

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LUCILLE CAPRA,

Plaintiff and Appellant,

v.

THOMAS CAPRA et al.,

Defendants and Respondents.

D074706

(Super. Ct. No. INP1700120)

APPEAL from an order of the Superior Court of Riverside County, James A. Cox,  
Judge. Affirmed.

Parker Ibrahim & Berg, Kathleen Mary Kushi Carter and Heather P. Karl, for  
Plaintiff and Appellant.

Law Offices of Emanuel Barling, Jr., and Emanuel Barling, Jr., for Defendants and  
Respondents.

This case concerns interests in a cabin located on U.S. Forestry Service property in Mono County. Frank Capra, Sr.,<sup>1</sup> owned the possessory and residential interest in the cabin and devised it to his children in his will. His children are disputing their rights to the cabin. A complaint contesting these rights was filed in Mono County and is now pending on appeal in the Third District Court of Appeal, *Capra v. Capra*, case number C084032.

This case involves substantially the same parties seeking substantially the same relief in this probate case of Frank Capra, Sr., in Riverside County, as in the case pending in the Third District. The trial court ordered this case to be held in abatement pending the outcome of the Third District's ruling and denied Plaintiff and appellant Lucille Capra's request for a preliminary injunction due to the abatement. We affirm that order.

### BACKGROUND

Frank, Sr., obtained a Term Special Use Permit for Recreation Residence (Permit) from the U.S. Forestry Service giving him the right to reside in a cabin in June Lake and to own the property inside the cabin. He died in 1991 and his assets were distributed in this probate action in Riverside County. Use and possession of the cabin were devised to the Capra Family Trust, to be distributed jointly to his three children, Lucille, Frank, Jr.,<sup>2</sup> and Thomas. Defendant and respondent Thomas disputes these allegations and asserts

---

<sup>1</sup> The individual parties all have the same last name, Capra, so first names will be used for clarity. No disrespect is intended.

<sup>2</sup> Frank, Jr., died in 2007. His wife Deborah and his three children Frank Capra, III, Jonathan, and Christina inherited his estate.

that the Permit was terminated by its terms upon the death of Frank, Sr. Thomas avers that he applied for and received a new residence Permit for the cabin in his name. He and his wife Kris now claim exclusive possession and control of the cabin.

Lucille and two of Frank, Jr.'s children — Frank III and Jonathan — filed a complaint in Mono County<sup>3</sup> that stated causes of action for declaratory relief, conversion, breach of fiduciary duty, constructive trust, trespass to chattel, fraud and concealment, theft by false pretense, fraud and deceit, and negligent misrepresentation. The Mono County Superior Court ruled that the complaint concerned the existence of property given to the Capra Family Trust by Frank, Sr.'s will. It concluded that the Riverside County Superior Court had exclusive jurisdiction over the internal affairs of the Capra Family Trust, including distribution of its assets. The Mono County complaint was dismissed without prejudice on January 19, 2017. Plaintiffs Lucille, Frank III, and Jonathan appealed, and defendants Thomas and Kris cross-appealed. The appeal is pending in the Third District Court of Appeal, as noted above.

---

<sup>3</sup> That complaint was originally filed in Los Angeles County then transferred to Mono County.

After dismissal of the Mono County case, Lucille filed this separate petition in Frank, Sr.'s Riverside County probate action on February 27, 2017, under the caption of *"In the matter of the Capra Family Trust dated November 25, 1974; Lucille Capra, Petitioner, v. Thomas Capra, Kris Capra, Does 1 to 20, Respondents."* On March 2, 2017, Lucille filed a request for a preliminary injunction to prevent Thomas and Kris, from disbursing the proceeds of the sale of the cabin, from making other changes in the offer for sale without Lucille's consent, and from denying Lucille, Frank III, and Jonathan from visiting and using the cabin. The next day, Thomas and Kris filed a motion to stay the proceedings pending the outcome of the appeal from the Mono County order of dismissal. The motions were heard together.

The trial court deemed Thomas and Kris's motion as a request for abatement and granted it. It found that both this petition and the Mono County complaint had "substantially similar allegations and similar causes of action that address . . . the same primary rights (right to the cabin and its contents, and right to be free from breach of trust). Further, . . . there is unity of the parties." Because the Mono County case was pending in the Third District Court of Appeal, the trial court found this case was "subject to a plea in abatement, which is a matter of right, not discretion." Lucille's application for a restraining order was denied due to the abatement.

Lucille appeals from the order denying her request for a preliminary injunction and abating the action. (Code Civ. Proc., § 904.1, subd. (a)(6).) The order of abatement is appealable because it necessarily affects the denial of the request for the injunction. (Code Civ. Proc., § 906.)

## DISCUSSION

We have reviewed the Mono County complaint and this petition and agree with the trial court that the two matters raise substantially similar causes of action that address the same primary rights about possession and use of the cabin and Permit, and that there is a unity of interest in the parties in both cases.

We affirm the trial court's order abating the causes of action raised in the petition. The violation of a single primary right constitutes a single cause of action that may not be litigated in different courts at the same time. (*Wulfjen v. Dolton* (1944) 24 Cal.2d 891, 894–895.) When an earlier-filed action based on the same transactions between the same parties is pending, the later-filed case must be abated until conclusion of the first case. "The pendency of another earlier action growing out of the same transaction and between the same parties is a ground for abatement of the second action." (*Leadford v. Leadford* (1992) 6 Cal.App.4th 571, 574; *Wulfjen v. Dolton*, at pp. 893–895 [same; appeal pending in prior action].) An order of abatement stays all proceedings in the later case until final disposition in the earlier case. (*Lawyers Title Ins. Corp. v. Superior Court* (1984) 151 Cal.App.3d 455, 459; *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 253, fn. 26.) Abatement is a matter of right when the conditions for its issuance exist. (*Lawyers Title*, at p. 460.) A trial court has no discretion to allow the second action to proceed if it finds the first involves substantially the same controversy between the same parties. (*Leadford*, at p. 574.)

Lucille contends that the order of abatement did not preclude granting her request for a preliminary injunction. She argues that a preliminary injunction is not abated

because it does not address the merits of the case but merely preserves the status quo until the abated issue is decided. (*People ex rel. Garamendi v. American Autoplan* (1993) 20 Cal.App.4th 760, 771, 774; see *Paul v. Allied Dairymen, Inc.* (1962) 209 Cal.App.2d 112, 122–123.) In this case, however, because the proper court for litigation of the issue has not yet been finally decided, the Riverside County Superior Court's issuance of a preliminary injunction would infringe on the case pending in the Third District Court of Appeal. We decline to approve such an action. The trial court did not abuse its discretion in denying the request for a preliminary injunction. (*City of Vallejo v. NCORP4, Inc.* (2017) 15 Cal.App.5th 1078, 1085 [trial court's denial of request for preliminary injunction is reviewed for an abuse of discretion].)

Requests for judicial notice were filed by Lucille on March 15, 2018, and by Thomas and Kris on April 17, 2018. We deny Lucille's request because all the documents were filed in Mono County Superior Court and in the Third District Court of Appeal after she filed her petition here. Those documents are not relevant to the issues in this appeal. The documents requested to be noticed by Thomas and Kris are similarly not relevant. The documents contain demurrers with substantive arguments that were filed in the Mono County Superior Court case and in a petition for writ of mandate filed in the Third District Court after this action was commenced. We deny both requests for judicial notice.

## DISPOSITION

The order of the trial court is affirmed. Respondents to recover their costs on appeal.

BENKE, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.